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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/541,294	06/30/2005	James M Milliken	248.03	6643
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ERICKSON & KLEYPAS, L.L.C.				EXAMINER
800 W. 47TH STREET, SUITE 401				HAYES, KRISTEN C
KANSAS CITY, MO 64112		ART UNIT	PAPER NUMBER	
		3643		
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		08/07/2008	PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/541,294	<b>Applicant(s)</b> MILLIKEN, JAMES M
	<b>Examiner</b> Kristen C. Hayes	<b>Art Unit</b> 3643

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If no period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### **Status**

1) Responsive to communication(s) filed on 18 April 2008.

2a) This action is FINAL.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### **Disposition of Claims**

4) Claim(s) 1-20 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-20 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### **Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### **Priority under 35 U.S.C. § 119**

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### **Attachment(s)**

1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO/SB/08)  
 Paper No(s)/Mail Date \_\_\_\_\_

4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date. \_\_\_\_\_

5) Notice of Informal Patent Application  
 6) Other: \_\_\_\_\_

**DETAILED ACTION**

***Drawings***

1. In addition to Replacement Sheets containing the corrected drawing figure(s), applicant is required to submit a marked-up copy of each Replacement Sheet including annotations indicating the changes made to the previous version. The marked-up copy must be clearly labeled as "Annotated Sheets" and must be presented in the amendment or remarks section that explains the change(s) to the drawings. See 37 CFR 1.121(d)(1). Failure to timely submit the proposed drawing and marked-up copy will result in the abandonment of the application.

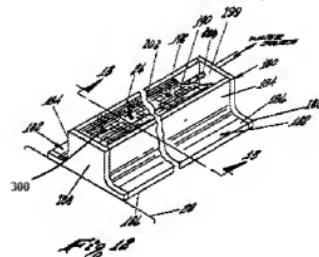
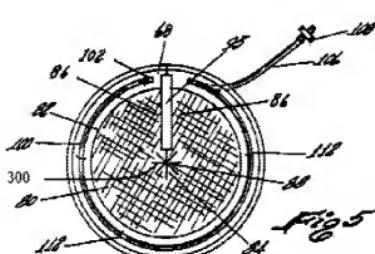
***Claim Rejections - 35 USC § 102***

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 16, 17, 19, 20 are rejected under 35 U.S.C. 102(b) as being anticipated by Baird US Patent 5,709,049.



Modified Figure 5, US Patent 5,709,049

Modified Figure 12, US Patent 5,709,049

4. Regarding claim 16, Baird discloses a garden weed barrier and watering apparatus (20, 180) comprising landscape fabric (Baird, column 2: lines 1-2), having edge portions (42 or 184, 186) weighted to retain said fabric in a selected position upon the ground (Baird, column 2: lines 4-7), an opening (88 or 300) (Baird, column 7: lines 45-47) within said fabric for receiving garden plants (24), and a water-permeable tube (100 or 200) (Baird, column 5: lines 17-18) attached to the underside of said fabric adjacent an edge of the opening (Baird, Figures 5, 12).
5. Regarding claim 17, Baird discloses a device with the limitations of claim 16 further characterized by the tube (100 or 200) having segments thereof attached in close proximity to corresponding openings (Baird, Figure: 12).
6. Regarding claim 19, Baird discloses a device with the limitations of claim 19 further characterized by the openings (88 or 301) being partially defined by respective portions of the tube (100 or 200) (Baird, Figure: 5).
7. Regarding claim 20, Baird discloses a method of gardening whereby weeds are suppressed through obstruction of sunlight, and fluids are delivered to garden plants via a conduit (100), the method comprising the steps of: providing an opaque vapor-permeable sheet

having weighted outer edges (Baird, column 2: lines 1-2, column 7: lines 45-47) of sufficient flexibility to conform to the surface of the ground, column 4: line 41, column 2: lines 4-7) and having openings (Baird, Figure: 12) for garden plants to extend therethrough, attaching a fluid-permeable conduit (104 and 100 or 200) to the underside of the sheet, applying the sheet to an area of ground, and directing water to the conduit for flow therethrough at intervals selected for (Baird, column 2: lines 30-32) encouraging plant growth. Given the structure of Baird is the same as the claimed structure the method is inherently performed.

***Claim Rejections - 35 USC § 103***

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. Claims 1, 2, 5 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Smith US 3,955,319 in view of Frydryk US 4,044,501 and Chapin US 3,361,359.

10. Regarding claim 1, Smith discloses a garden weed barrier and watering apparatus (Smith, Figures 1-8A) comprising a flexible sheet (10) of vapor-permeable material (Smith, column 2: lines 44-47), an opening (formed by slits such as 13) in said sheet for garden plant (P) stems to extend therethrough, with said opening formed from a flap cut from said sheet; means for weighting said edges to substantially conform said edges to the surface of the ground (Smith, column 3: line 68-column 4: line 1). The limitation of *said flap folded back upon the underside of said sheet to form a tube* is considered to be intended use. A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior

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art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Not disclosed is the sheet having reinforced outer edges, a fluid permeable hose or the hose threaded through a tube. Frydryk teaches a weed barrier with reinforced edges (12, 14). Chapin teaches a permeable hose (44) in a weed barrier system. The examiner takes official notice that hoses treaded trough tubes are arrangements known in the art (as evidenced by US 3,205,619; US 6619565 B1; US 5,839,659; US 3,361,359; and Chapin). The hose of Chapin would be able to be threaded through a tube formed by Smith. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the device of Smith with the reinforced edges of Frydryk as to strengthen the edges of the sheet, the permeable hose of Chapin as to provide an irrigation system, and to thread the hose trough a tube (as well known in the art) to secure the hose to the device.

11. Regarding claim 2, Smith as modified by Frydryk and Chapin disclose the device of claim 1. Smith further discloses the sheet comprising a polyethylene material (Smith, column 3: line 63. Non-woven polyethylene is known in the art. Frydryk further discloses a weed barrier made of non-woven polymer material (Frydryk, column 4: lines 33-35). It has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416. It would have been an obvious matter of engineering design choice to one of ordinary skill in the art at the time of the invention to make the sheet of Smith out of a non-woven polyethylene material depending on the type of material desired by the user.

12. Regarding claim 5, Smith as modified by Frydryk and Chapin disclose the device of claim 1. Frydryk further discloses the reinforced edges being double layer of the sheet (Frydryk, column 3: lines 44-46) secured by adhesive (Frydryk, column 5: lines 27-29, lines 42-43).

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13. Regarding claim 6, Smith as modified by Frydryk and Chapin disclose the device of claim 1. Frydryk further discloses the reinforced edges having holes (35).

14. Claim 1, 3, 4, 7-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baird US Patent 5,709,049.

15. Regarding claim 1, Baird discloses a garden weed barrier and watering apparatus (20 or 180) comprising a flexible sheet (80 or 190) of vapor-permeable material (Baird, column 2: lines 1-2), said sheet having reinforced outer edges (34 or 184, 186)(Baird, column 4: lines 7-9), an opening (Baird, Figure: 12) in said sheet for garden plant (24) stems to extend therethrough, with said opening formed from a flap cut from said sheet; means for weighting said edges to substantially conform said edges to the surface of the ground (Baird, column 2: lines 4-7); and a fluid-permeable (104) hose (100 or 200). The limitation of *said flap folded back upon the underside of said sheet to form a tube* is considered to be intended use. A recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. Not disclosed is the hose threaded through a tube. However, the examiner takes official notice that such arrangements are known in the art (as evidenced by US 3,205,619; US 6619565 B1; US 5,839,659; US 3,361,359; etc.). The hose of Baird would be able to be threaded through the tube formed. It would have been obvious to one of ordinary skill in the art at the time of the invention to modify the device of Baird so that the hose was threaded into a tube (as well known in the art) to secure the hose to the device.

16. Regarding claim 3, Baird discloses a device with the limitations of claim 1 further characterized by the sheet comprising a woven textile material (Baird, column 4: lines 33-34).

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17. Regarding claim 4, Baird discloses a device with the limitations of claim 1 further characterized by the sheet comprising a thermoplastic material (Baird, column 4: lines 38-40). As to the limitation of the thermoplastic material being felted, claim 4 is considered to be a product-by-process claim, and the examiner notes that it has been held that even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. Additionally, the patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 227 USPQ 964, 966 (Fed. Cir. 1985) {see MPEP 2113}.

18. Regarding claim 7, Baird discloses a device with the limitations of claim 1 further characterized by the openings being substantially rectangular (300) (Baird, column 7: lines 45-47). The slit in the sheet is considered to be a rectangular opening, meeting the limitations of the claim.

19. Regarding claim 8, Baird discloses a device with the limitations of claim 1 further characterized by the openings being arranged in one or more substantially parallel rows (Baird, column 7: lines 18-25). The devices are arranged in parallel pairs, therefore the openings are arranged in parallel rows.

20. Regarding claim 9, Baird further discloses the openings being substantially circular (in that when the rectangular openings were folded back a circular opening could be formed. Baird, Figure 1, 2).

21. Regarding claim 10, Baird discloses a device with the limitations of claim 1 further characterized by the means for weighting being rubber bars (Baird, column 7: lines 30-31).

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22. Regarding claim 11, Baird discloses a device with the limitations of claim 1 further characterized by the sheet being substantially opaque (Baird, column 7: lines 45-47, column 4: line 41).

23. Regarding claim 12, Baird further discloses the means for weighting comprises one or more solid weights attached about the periphery of said sheet, the weights having sufficient flexibility to substantially conform the periphery to the surface of the ground (Baird, column 2: lines 4-7).

24. Regarding claim 13, Baird discloses a device with the limitations of claim 1 further characterized by the tube comprising means for restricting flow of fluid therethrough (108)(Baird, Figure: 2). The change in diameter of element (108) would restrict the flow of fluid, meeting the limitations of the claim.

25. Regarding claim 14, Baird discloses a device with the limitations of claim 13. Baird does not disclose the means for restricting comprising a flat plastic disk with an aperture positioned within the tube. However, the examiner takes official notice that this is well known in the art to restrict the flow of fluid. The disk blocks the flow of the fluid, and the size of the aperture changes the area the fluid flows through, determining the mass and volumetric flow rates of the fluid. This is an effective, simple way to restrict the flow of fluid through a tube or pipe. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the device of Baird with a flat plastic disk comprising an aperture, positioned within the tube to provide a simple way to restrict the flow of fluid through the tube, as known to those in the art.

26. Regarding claim 15, Baird discloses a device with the limitations of claim 13 further characterized by the means for restricting comprises a conical flow restrictor (108) comprising a

cone having a flange projecting from the base of said cone (Baird, Figure: 2) and an axial bore (Baird, column 5: lines 22-24) through the longitudinal center of said conical flow restrictor.

27. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Baird US Patent 5,709,049 in view of Odenkirk US Patent 3,029,558.

28. Regarding claim 18, Baird discloses a device with the limitations of claim 16 further characterized but does not disclose weights secured within pockets. However, Odenkirk teaches the edge portion comprising weights secured within edge pockets (Odenkirk, column 2: lines 66-68). The weights being secured within edge pockets would allow the weights to be interchangeable. If more or less weight was needed, it could be added or removed from the edge pockets accordingly. This would allow the device to be used in a variety of applications and environments. Also, different weighing means such as sand or water could be used. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the device of Baird with the weights secured in edge pockets of Odenkirk to allow the weights of the device to be interchangeable.

#### ***Response to Arguments***

29. Applicant's arguments with respect to claims 1, 16 and 20 have been considered but are moot in view of the new ground(s) of rejection.

30. The reinforced outer edges of Baird are considered elements (42 or 184, 186). These edges do contact the ground and therefore meet the limitations of the claim.

31. The limitation of the water-permeable tube being "adjacent" and edge of the opening is considered to be broad. Baird is still considered to read on this limitation.

***Conclusion***

32. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kristen C. Hayes whose telephone number is 571-270-3093. The examiner can normally be reached on Monday-Thursday, 7:00-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter Poon can be reached on (571)272-6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

KCH  
1 August 2008

Peter Poon  
Examiner  
Art Unit 3643

/Peter M. Poon/  
Supervisory Patent Examiner, Art Unit 3643